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IN THE
Supreme Court of the United States
October Term, 1992
92-1040

James Barber, et al.
*Petitioners,*

v.
Michael Horsey,
individually, et al.
*Respondents,*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

# PETITIONERS' REPLY BRIEF

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**PETITIONER JAMES BARBER ET AL.'S REPLY BRIEF IN FAVOR OF GRANTING CERTIORARI**

**1. POLITICAL QUESTION PRINCIPLE IS NOT A PROPER REASON TO DENY CERTIORARI.**

Respondents answer to the Petition for Certiorari raised the alleged application of the "political question" principle. Respondent Horsey attempts to convert the political question doctrine, which is in reality a judicial deference to separation of powers, into a new form of political immunity for politicians.[1] Such was never the purpose of the political question principle, **Nixon v. Herndon** 273 U.S. 536, 540 (1927).

The modern formulation of the use of political question discretion by the court is

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[1] Although Respondents raised the issue in the United States District Court, it was not argued in their appellant brief and is therefore waived on appeal.

found in **Baker v. Carr** 369 U.S. 186 (1962). Briefly stated a federal court defers to rule on an issue on political question grounds when the court finds

> ... a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.
> **Baker** supra p. 217.

More fully stated, the court looks to: the lack of existence of requisite factual information, the difficulty in obtaining that information, the necessity for uniformity of decision, the wider responsibility of political departments and lack of adequate legal standards, **Baker** p.217.

An examination of each of these elements of analysis shows that the case at bar is justiciable. The facts of the current case are simple and straightforward. The actions of Defendant Horsey are reviewable by the court in normal trial fashion. This is <u>not</u> a case of judicial review of whether large scale factual

allegations support or detract from some legislative or executive policy enactment.

The plain admission by the appeals and district court below that there is a patent divergence in precedent between state and federal courts shows that the uniformity of decision argument points toward hearing the case at bar, not avoiding it.

There is no lack of adequate legal standards as the Pennsylvania election code's adoption of the party rules are quite precise of what should have taken place in the facts at bar.

Finally and most importantly, this case is not a decision reviewing the wider responsibility of different political departments of government. This central consideration is why most, if not all, U.S. Supreme Court precedents employing the political question principle are limited to cases concerning separation of powers, particularly between the federal branches of government, guarantees of republi-

can government of the states, foreign affairs, and certification of the enactment of legislation. As Justice Brennan wrote:

> It is the relationship between the judiciary and the coordinate branches of the Federal Government, and the federal judiciary's relation to the States, which gives rise to the 'political question'... The nonjusticiability of a political question is primarily a function of separation of powers...
> **Baker**, supra p. 210

The court then summed up the doctrine,

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers.
> **Baker**, supra p. 217

The essential analysis of **Baker v. Carr** has been reaffirmed on several occasions by the United States Supreme Court, **Powell v. McCormack** 395 U.S. 486 (1969); **Gilligan v. Morgan** 413 U.S. 1, 10 (1973); **Goldwater v. Carter** 444 U.S. 996, 1002 (1979).

With the wave of a footnote (p. 8, n. 1 in Respondent Horsey's brief opposing certiorari),

Respondents claim the **O'Brien v. Brown** case does away with the numerous U.S. Supreme Court precedents defining what a political question is. First **O'Brien v. Brown** was not a decision on the political question issue. The issue was mooted by the passage of time and was not considered on those merits by the court. The case was remanded as moot, **O'Brien v. Brown** 409 U.S. 816 (1972). **Cousins v. Wigoda** likewise specifically stated that the court did not have the political question issue before it, **Cousins** 419 U.S. 477, 483 n. 4 (1) (1975). To argue, as Respondents try, that two mooted precedents overrule the line of precedent flowing from **Baker v. Carr** is to create a legal phantasm.

Respondent Horsey attempts, through the misleading use of the term "political," to transform political question into a kind of "political immunity." The "political question" precedents appropriately apply only to cases deferring to a separation of powers between the three federal branches of government. Members

of political parties are not free to violate election and civil rights laws because the perpetrator is politically active or a member of a recognized party. While it is a common misconception in the minds of some politicians that their possession of a small bit of political power places them above the law, the courts indisputably enforce the application of the law to all, powerful and powerless alike. Even the President of the United States cannot hold his political authority above the laws of our land, **U.S. v. Nixon** 418 U.S. 683, 706 (1974). So why should a Philadelphia ward leader be afforded a political immunity denied to even the President?

**2. PROTECTION OF THE RIGHT OF POLITICAL ASSOCIATION FAVORS THE GRANT OF CERTIORARI.**

Respondent Horsey's claim, that the ward leaders are immune from court review for violations of enforcement of both the Party's own rules and the Pennsylvania Election Code because of a federal right of political association, is patently false. First, as already listed in the numerous citations in Petitioner's brief for certiorari indicate, party primaries are not private party affairs when it comes to violating federal civil rights.

All of the cases cited by Respondents' answering brief, **Cousins v. Wigoda** 419 U.S. 477 (1975); **O'Brien v. Brown** 409 U.S. 1 (1972); **Eu v. San Francisco Democratic Committee** 489 U.S. 214 (1988), deal with direct conflicts between state law and national or state party rules. Such is not the case at bar in which Pennsylvania statute is in harmony with party rules.

Indeed, Pennsylvania incorporates the rules into law, 25 P.S. 2837. Rather, the case at bar is one in which the Respondent Horsey violated the First and Fourteenth Amendment rights of Petitioners Barber et al. by Respondent Horsey's violation of both party rule and state law.

The court here should extend the same protection to First and Fourteenth Amendment rights claimed by Petitioners James Barber et al. as has the Pennsylvania and U.S. Supreme Court and other federal courts have done. **Seergy v. Kings Co. Rep. Co. Committee** 459 F. 2d 308 (CA2 1972).

Refusing to allow the newly elected committeepersons to vote on the ward reorganization is nothing less than a denial of the vote of the majority of Democratic voters in each of the precincts that elected the committeepersons. This antidemocratic activity is to be weighed against the free speech and due process rights of the successfully elected

committeeperson which are suppressed by the denial of their votes.

The essence of the right of individual political association is to become politically active, to express a political opinion, to have that opinion weighed by the majority of voters, and to have those votes counted. **Reynolds v. Sims** 377 U.S. 533, 84 S.Ct. 1362, 126 L.Ed.2d 506 (1964); **Avery v. Midland County** 390 U.S. 474 (1968).

> Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as federal elections. A consistent line of decisions by this Court in cases involving attempts to deny or restrict the right of suffrage has made this indelibly clear.... The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.
> **Reynolds v. Sims** 377 U.S. 533 at 561-562 (1964)

. It is in a total negation of the First Amendment right of political association to deny the vote count of the majority, to disenfranchise the successful candidate. Respondent Horsey's contention that they have a right to deny the majority its vote is not a protection of the right of political association, but its destruction. The right of free expression is not merely an individual right, but accumulates as the voice of the majority as well.

> The interests involved are not merely those of parties or individual candidates; the voters can assert their preference only through candidates of parties or both and it is this broad interest that must be weighed in the balance.
> **Lubin v. Panish** 415 U.S. 709, 716 (1974)

Rather than a step toward political freedom, Respondent Horsey's argument is a step toward arbitrary rule. The protection of the ideal of free elections, even on a grass roots level, is too important for this court not to rule in this case.

## 3. CONCLUSION.

The ultimate question should not be whether a judge is fearful of a politically controversial case and so grants a "political immunity" to small power brokers who break the election law of Pennsylvania. Rather the final analysis is whether the courts will enforce the Pennsylvania election law to prevent cheating. The blind eye that some courts have given to violations of election law does not make the violations self correcting. It only perpetuates wrongdoing and destroys the most fundamental of federal civil rights, the right to democratic elections.

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